83-1255

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No. ____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

Stephen J. Hacker, Petitioner

vs.

The Fifth Third Bank, Respondent

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

Petition for Certiorari

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QUESTIONS PRESENTED FOR REVIEW[1]/

Did the District Court violate Petitioner's right to due process of law under the Fifth Amendment to the United States Constitution by appointing a receiver for personalty with inadequate notice and without a meaningful hearing?

Did the District Court err to Petitioner's prejudice by appointing a receiver for personalty with inadequate notice and without a meaningful hearing, where the District Court did not make the requisite finding under Ohio law that Respondent would suffer irreparable injury if there was a short delay for a meaningful hearing?

1/The parties to the proceedings below were The Fifth Third Bank, Plaintiff-Appellee, and Stephen J. Hacker and SJH Enterprises Inc., Defendants-Appellants.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio was announced from the bench and is appended to this Petition in the Appendix. (App. 77).[2/] The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is appended to this Petition in the Appendix. (App. 1-11).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on November 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[2/] All references to the Appendix are to the page of the Appendix on which the reference appears.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULE OF CIVIL PROCEDURE

U.S. CONST. AMEND. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeapardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV. SECTION 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254(1). (1) Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . .

28 U.S.C. § 1332(a). (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state are additional parties; and

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

42 U.S.C. § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OHIO REV. CODE § 2503.20

This statute is reproduced in the Appendix. (App. 115)

OHIO REV. CODE § 2715.04.

This statute is reproduced in the

Appendix. (App. 118)

OHIO REV. CODE § 2715.041.

This statute is reproduced in the Appendix. (App. 120)

OHIO REV. CODE § 2715.042.

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OHIO REV. CODE § 2715.043.

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OHIO REV. CODE § 2715.045(A) and (B).

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OHIO REV. CODE CHAPTER 2735.

This statute is reproduced in the Appendix. (App. 146)

OHIO REV. CODE § 2737.04.

This statute is reproduced in the Appendix. (App. 152)

OHIO REV. CODE § 2737.05.

This statute is reproduced in the

Appendix. (App. 154)

OHIO REV. CODE § 2737.06. This statute is reproduced in the Appendix. (App. 161).

OHIO REV. CODE § 2737.07. This statute is reproduced in the Appendix. (App. 164)

OHIO REV. CODE §2737.19. This statute is reproduced in the Appendix. (App. 166).

FEDERAL RULE OF CIVIL PROCEDURE 64. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the

remedy is sought subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however, designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

STATEMENT OF THE CASE

On September 21, 1983, Plaintiff

Fifth Third Bank ("the Bank"), an Ohio bank, filed a Complaint for a money judgment only on a Promissory Note against Stephen J. Hacker, a resident of Winter Park, Florida, and for a money judgment only against SJH Enterprises, Inc. ("SJH"), an Ohio corporation, on a Guaranty of said Note, in the United States District Court for the Southern District of Ohio, Western Division. (App. 94). Jurisdiction was premised on 28 U.S.C. § 1332. With the Complaint, the Bank filed a Motion for Appointment of Receiver, supported by an Affidavit of a Bank officer. (App. 99) The District Court then set the Bank's Motion for Hearing the following day at 2:30 p.m., but Defendants' counsel, who was known to the Bank's counsel, was not notified of the filing of the Complaint, the Motion or the

hearing until 9:00 a.m. the next morning. (App. 111).

Defendants' counsel immediately obtained a copy of the pleadings from the Clerk and, subsequently, copies were delivered by the Bank's counsel. Because Mr. Hacker was not in his regular place of business in Winter Park, Florida, but was in Houston, Texas, on business, his counsel was unable to reach him to advise him of the Complaint and Motion until 11:40 a.m. on September 22, 1983, approximately three hours before the hearing. (App. 111).

In its Motion, the Bank claimed a security interest in thirty-four horses, ten horse syndications and products and proceeds thereof according to a certain Security Agreement and purported attachments thereto appended to its Motion.

Because Mr. Hacker disputed whether certain descriptions of collateral were attached to the Security Agreement when he signed it, whether the Security Agreement applied to certain of the alleged collateral and the products and proceeds thereof, and the conclusory allegations of the Bank officer's Affidavit, it was immediately apparent that Mr. Hacker would have to be present in court to testify in opposition to the Bank's Motion. His counsel filed a Motion for Continuance, advising the Court that neither counsel nor Hacker had been advised of the Complaint, Motion or hearing until that morning, that Mr. Hacker was in Houston, Texas and could not appear at the 2:30 p.m. hearing to defend his interests, and there were substantial defenses to the Bank's Motion which required Mr.

Hacker's presence to present. (App. 108)[3/]

At the hearing, the District Court summarily denied Defendant's Motion for a Continuance and stated it intended to appoint a receiver without hearing evidence because the collateral "might be in some danger." (App. 27, 29, 39) Upon Defendants' counsel's objection to such a proceeding, the Court permitted Plaintiff's counsel to call the Bank officer to the stand and, over Defendants' objection, give conclusory, hearsay testimony which purported to support but in significant aspects contradicted the Bank's Motion and his Affidavit. (App. 41-59) During cross-examination of the Bank officer by Defendants' counsel, the Court sustained the Bank's

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[3/]Houston is about a half day plane trip from Cincinnati.

objection to cross-examination seeking to impeach the foundation for his testimony in chief, thereby making the Bank's evidence unrebuttable without Mr. Hacker present to testify. (App. 74) The Court then appointed a receiver for all horses and products and proceeds thereof claimed by the Bank. (App. 76-78; 12)

The stated grounds for the appointment of the receiver were that the District Court preferred to "guess" in favor of the Bank, because if the Court guessed wrong, it might destroy the collateral security of the Bank. (App. 29) The Court disregarded any possible harm to Mr. Hacker from the improvident appointment of a receiver. (App. 31-33; 80-81) The District Court ruled that the identification and application of Ohio law was not "too significant"

because the District Court had general equity power to appoint a receiver (App. 33) The Court of Appeals affirmed on the grounds that the District Court had not abused its discretion in appointing the receiver. (App. 6) Neither the District Court nor the Court of Appeals made the requisite finding under Ohio law that the Bank would suffer irreparable injury if there was a short delay to give Mr. Hacker adequate notice and a meaningful hearing.

Subsequent to the appointment of the receiver by the District Court, Defendants' filed Motions For Summary Judgment and to Dismiss on the grounds that there was not complete diversity of citizenship and the Court lacked personal jurisdiction over Mr. Hacker. The District Court granted the Motion to Dismiss for Lack of Subject Matter

Jurisdiction, but granted the Bank five days to dismiss Defendant SJH Enterprises and thus preserve diversity. In accordance with the District Court's ruling SJH Enterprises was dismissed from this action. Remaining motions, including Mr. Hacker's Motion to Set Aside the Receivership, are submitted.

ARGUMENT

1. Summary.

The decision below should be reviewed to determine the extent to which Fifth Amendment due process criteria are applicable to a pre-judgment seizure of personalty in a diversity case and to consider whether federal courts in diversity cases are bound to follow state substantive law effectuating due process criteria and

balancing the interests of debtors and creditors. The District Court appointed a receiver, with inadequate notice and without a meaningful hearing, without the requisite finding under Ohio law that there would be irreparable injury to the Bank if there was a delay for notice and hearing. Such appointment was a violation of due process rights articulated by this Court in Fuentes vs. Shevin, 407 U.S. 67, rehearing denied, 409 U.S. 902 (1972) and Lugar vs. Edmondson Oil Co., 457 U.S. 922 (1982), and places the District Court and Court of Appeals in implied conflict with the Ohio Supreme Court's decision in Peebles vs. Clement, 63 Ohio St.2d 314, 308 N.E.2d. 689 (1980) and in direct conflict with Ohio's statutes for pre-judgment seizure of personalty enacted thereafter. Ohio

Revs. Code § 2715.045 (B) (Page Supp. 1983); Ohio Revs. Code §2737.19 (Page Supp. 1983); See also Cleveland Railway Co. vs. Jewett, 37 Ohio St. 649 (1882). This Court should grant review to determine whether appointment of a receiver in a diversity case is governed by federal constitutional and state substantive law, or whether such appointment is within the unrestrained discretion of the District Court.

2. Where There Is State Action, There Is A Fourteenth Amendment Due Process Right To Notice And A Meaningful Hearing Before A Pre-Judgment Seizure Of Personalty.

In six principal cases, this Court has considered the applicability of Fourteenth Amendment due process

criteria to pre-judgment seizures of personalty pursuant to particular state statutes. Although three of these cases, Fuentes vs. Shevin, 407 U.S. 67 (1972), Flagg Brothers, Inc. vs. Brooks, 436 U.S. 149 (1978), and Lugar vs. Edmondson Oil Co., 457 U.S. 922 (1982), arose as federal question actions pursuant to 42 U.S.C. § 1983, none of the principal cases arose from the alleged failure of a federal court in a diversity case to apply Fifth or Fourteenth Amendment due process criteria or the failure of a federal court to follow state substantive law effectuating due process criteria. Therefore the questions raised by the instant case in this Court appear to be unique.

In Sniadach vs. Family Finance Corp., 395 U.S. 337 (1969), on

certiorari from the Supreme Court of Wisconsin, this Court held Wisconsin's garnishment statute violated the due process clause of the Fourteenth Amendment because it permitted pre-judgment seizure of a person's wages without notice or judicial review. Writing for the majority, Justice Douglas emphasized that such a pre-judgment garnishment "may impose tremendous hardship on wage earners with families to support." 395 U.S. 337, 340. Justice Harlan wrote a concurring opinion, and Justice Black dissented on the grounds the statute gave the petitioner adequate notice and hearing, and that the Fourteenth Amendment did not grant this Court the right to strike down state statutes with which a majority disagreed for policy reasons.

In Fuentes vs. Shevin, 407 U.S. 67 (1972), on appeals from decisions of three judge panels in actions pursuant to 42 U.S.C. § 1983, this Court considered certain Florida and Pennsylvania pre-judgment attachment statutes, which in substance provided for seizure of personalty on the ex parte application of a creditor without notice and hearing to the debtor. Although the Florida statute in question provided for a hearing on the merits of the conflicting claims to the property after seizure, and the Pennsylvania statute did not, the Court held both statutes violated due process under the Fourteenth Amendment because persons whose property was to be seized were entitled to be notified and granted a pre-seizure hearing at a meaningful time and in a meaningful

manner. 407 U.S. 67, 80-82. Speaking for a majority of four justices, Justice Stewart applied traditional due process concepts to pre-judgment seizures of personality in the debtor-creditor context in bold and broad language. See 407 U.S. 67, 80-82. Rather than reading Sniadach as limited to "necessities" of life such as wages, the majority read Sniadach as being in the mainstream of due process cases. 407 U.S. 67, 88-90. If the Fuentes requirement for a pre-seizure hearing at a meaningful time and in a meaningful manner is applied to the instant case, the Petitioner's due process rights were violated by a drumhead hearing without opportunity for Mr. Hacker to appear in person to testify on his own behalf.

In a dissenting opinion in which

the Chief Justice and Justice Blackmun joined, Justice White reasoned that in the debtor-creditor context, where there was a probable default, state laws providing for immobilizing disputed property were a reasonable balance of the interests of debtor and creditor until the underlying dispute was resolved.

Thereafter, in Mitchell vs. W.T. Grant Co., 416 U.S. 600 (1974), on certiorari from the Supreme Court of Louisiana, this Court considered a Fourteenth Amendment due process challenge to a Louisiana statute, which in substance provided for pre-judgment sequestration of personalty on the affidavit of a lien holder and an order of a judge. Writing for a majority of five, Justice White noted that, under Louisiana law, transfer of personalty

by a debtor would destroy the creditor's lien. The Court held that the statute did not violate due process because there was judicial review of the creditor's affidavit and because there was an immediate right to a post-seizure hearing by the debtor. The majority construed Sniadach and Fuentes as holding only that a hearing must be had before a person is finally deprived of personalty. 416 U.S. 600, 611. In a dissent in which Justices Douglas and Marshall joined, Justice Stewart stated that the statutes in question were remarkably similar to those held unconstitutional in Fuentes and stated that they suffered from the same constitutional defect. Justice Brennan was in agreement that Fuentes required reversal of the judgment of the Supreme Court of Louisiana. 416

U.S. 600, 636. In a concurring opinion, Justice Powell stated that insofar as Fuentes required a hearing before a temporary seizure of personalty, it was overruled. Justice Powell reasoned that because both debtor and creditor had an interest in the personalty in question, the Louisiana statute was a reasonable balance of those interests.

Then, in North Georgia Finishing vs. Di-Chem, Inc., 419 U.S. 601 (1975), on certiorari from the Supreme Court of Georgia, this Court considered a Georgia statute which in substance provided for issuance of a writ of attachment on a conclusory affidavit of the plaintiff or his attorney before some officer or clerk of court. Writing again for a majority of five, Justice White held the Georgia statute

suffered the same constitutional infirmities as the statute considered in Fuentes, because it permitted a secured creditor to repossess personalty without prior notice or hearing and without prior judicial review. The Court distinguished Mitchell on the grounds the Louisiana statute required that the writ of sequestration could only be issued by a judge.

In concurring opinions, both Justice Stewart and Justice Powell stated the Court had revived Fuentes. Justice Powell, however, doubted whether Fuentes struck the proper balance between debtors and creditors in commercial transactions. 419 U.S. 601, 609-11. In a dissenting opinion in which Justice Rehnquist joined, Justice Blackmun noted the apparent

inconsistency of the Sniadach and Mitchell holdings with Fuentes. Justice Blackmun stated Fuentes was improvidently decided by a 4-3 decision when there were two vacancies on the Court at the time of argument. 419 U.S. 601, 617-18.

In Flagg Brothers, Inc. vs. Brooks, 436 U.S. 149 (1978), on certiorari from the United States Court of Appeals for the Second Circuit, in an action pursuant to 42 U.S.C. § 1983, this Court considered whether a warehouseman's proposed sale of goods pursuant to the New York Uniform Commercial Code was state action under 42 U.S.C. §1983. Writing for the majority, Justice Rehnquist distinguished Di-Chem, Fuentes and Sniadach on the grounds there was "overt official involvement" in the

seizures therein, whereas the New York warehouseman foreclosed his lien by sale without such state involvement. 436 U.S. 149, 157. Commenting on Justice Stevens' dissent, Justice Rehnquist emphasized the absence of a state order of seizure and held the mere enactment of a statute which enabled a warehouseman to convert his lien to title did not preclude a post sale action to challenge the sale. 436 U.S. 149, 162 n. 11. Therefore the Court held the absence of state action barred a claim under 42 U.S.C. §1983.

In a dissent in which Justices White and Marshall joined, Justice Stevens concluded the Court's holding was "fundamentally inconsistent with, if not foreclosed by . . ." the Court's prior holdings in Di-Chem, Fuentes and Sniadach. 436 U.S. 149, 169.

Rejecting the majority's distinction between overt official involvement and private action pursuant to a state statute, Justice Stevens reasoned the question considered should be whether the statute itself must meet due process criteria. 436 U.S. 149, 169.

Most recently, in Lugar vs. Edmondson Oil Co., 457 U.S. 922 (1982), on certiorari from the United States Court of Appeals for the Fourth Circuit, in an action pursuant to 42 U.S.C. § 1983, the Court applied due process and state action criteria from Di-Chem, Mitchell, Fuentes and Sniadach to a Virginia statute which provided for pre-judgment seizure of personalty on an applicant's affidavit without judicial review. Speaking for the Court, Justice White stated that "the Court has consistently held that

constitutional requirements of due process apply to garnishment and pre-judgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute." 457 U.S. 922, 932-33. Whereas the Chief Justice in his dissent and Justice Powell, in a dissent in which Justices Rehnquist and O'Connor joined, disagreed with the majority's construction of the "color of law" criteria of 42 U.S.C. § 1983 as articulated in the foregoing cases and in Flagg Brothers Inc. vs. Brooks, 436 U.S. 149 (1978), none of the Justices disagreed with Justice White's summary of the applicability of due process criteria to pre-judgment seizures of personalty cited above. Thus it now appears clear that there is a Fourteenth Amendment due process right

to adequate notice and to a meaningful hearing before pre-judgment seizure of property where there is state action. What the Court has not considered is whether there is a Fifth Amendment due process right to adequate notice and a meaningful hearing where the pre-judgment seizure is accomplished through a federal district court in a diversity case when that court does not follow applicable state law but its own version of general equitable principles.

3. Where There Is Federal Action, There is A Fifth Amendment Due Process Right To Adequate Notice And A Meaningful Hearing Before A Pre-Judgment Seizure Of Personalty.

The scope of procedural due process

under the Fifth Amendment can be no less than that under the Fourteenth Amendment. Although the instant case appears to be unique, in analagous cases, this Court has found the scope of due process under Fifth and Fourteenth Amendment to be the same. In the equal protection context, this Court, in Hurd vs. Hodge, 334 U.S. 24, 35-36 (1948), stated:

> We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

More recently, in Arnett vs. Kennedy, 416 U.S. 134, rehearing denied, 417 U.S. 977 (1974) (plurality opinion), by implication, this Court applied procedural due process standards under the Fourteenth Amendment to a situation

involving the Fifth Amendment right to due process. Accord Arnett vs. Kennedy, 416 U.S. at 164 (Powell, J., concurring) ("Governmental deprivation of [a Fifth or Fourteenth Amendment] interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing") (footnote omitted).

Lower federal courts are in accord that the right to procedural due process under the Fifth and Fourteenth Amendment is the same. For example, in Earnest vs. Willingham, 406 F.2d 681, 684 (10th Cir. 1969), the Court concluded:

> [I]t goes without saying that a Federal agency may not, consistently with Fifth Amendment due process, do that which a State is forbidden to do by Fourteenth Amendment due process. (footnote omitted).

Similarly, in Cater Ridge Nursing Home,

Inc. vs. Califano, 447 F. Supp. 1222, 1224 (D. Md. 1978), aff'd, 596 F.2d 608 (4th Cir. 1979), the Court stated:

> Under the Fifth and Fourteenth Amendments, the government cannot deprive an individual of a liberty or property interest without a due process hearing.

See also Coleman vs. Darden, 595 F.2d 533 (10th Cir.), cert. denied, 444 U.S. 927 (1979); Pan Am. World Airways, Inc. vs. U.S. District Court, C.D. Cal., 523 F.2d 1073 (9th Cir. 1975).

Federal courts, in the Fifth Amendment context, have considered this Court's holding that due process requirements of the Fourteenth Amendment apply to garnishment and pre-judgment attachment proceedings when there is state action. See, e.g., Geneva Towers Tenants Organization vs. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974) (discussing

Mitchell); Dennis vs. Blount, 497 F.2d 1305 (9th Cir. 1974); (discussing Sniadach); Tucker vs. Burton, 319 F. Supp. 567 (D.C. D.C. 1970) (discussing Sniadach). Thus, the Fourteenth Amendment due process right, to adequate notice and a meaningful pre-seizure hearing, articulated in Fuentes and Lugar, are applicable to this action.

The notice and hearing requirement of due process cannot be postponed except in extraordinary circumstances, which were not found present in this case. In the Fifth Amendment context, this Court has held that the due process right to notice and hearing can be postponed only in extraordinary situations involving important governmental or general public interest. See Calero-Toledo vs. Pearson Yacht

Leasing, 416 U.S. 663, rehearing denied, 417 U.S. 977 (1974) citing cases. This exception has been applied in situations where immediate seizure is necessary to protect the public from contaminated food, North American Cold Storage Co. vs. Chicago, 211 U.S. 306 (1908); from a bank failure, Coffin Bros. & Co. vs. Bennett, 277 U.S. 29 (1928); from misbranded drugs, Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594, rehearing denied, 340 U.S. 857 (1950); to aid in the collection of taxes, Phillips vs. Commissioner, 283 U.S. 589 (1931); to aid in the war effort, United States vs. Pfitsch, 256 U.S. 547 (1921); or to aid in forfeiture proceedings by the Government of Puerto Rico. Calero-Toledo vs. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). This exception, however, has not been

applied to normal debtor-creditor situations. In the instant case, there was no evidence whatsoever that the Bank would suffer irreparable injury if there were a brief delay so Mr. Hacker could fly from Houston to Cincinnati to testify on his own behalf. Furthermore, the District Court and Court of Appeals made no finding that the appointment of a receiver with inadequate notice and without a meaningful hearing was in furtherance of an important governmental interest.

Federal courts apply the same standards for determining whether there was federal action for purposes of the Fifth Amendment as are applied in determining whether there was state action for purposes of the Fourteenth Amendment. Warren vs. Government National Mortgage Association, 611 F.2d

1229 (8th Cir.), cert. denied, 449 U.S. 847 (1980); Geneva Towers Tenants Organization vs. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974).

In the instant action, there can be no dispute that there was federal action. The District Court itself ordered the seizure of the property of Petitioner with inadequate notice and without a meaningful hearing. Therefore Petitioner's rights to procedural due process under the Fifth Amendment were violated.

4. The Ohio Statutory Scheme For Pre-Judgment Attachment Or Possession Of Personal Property Requires Notice And Hearing Unless The Moving Party Will Suffer Irreparable Injury If

The Order Is Delayed To Give Such Notice And Hearing.

In Peebles vs. Clement, 63 Ohio St.2d. 314, 308 N.E.2d 689 (1980), the Ohio Supreme Court considered Ohio's pre-judgment attachment statutes in Ohio Revs. Code Chapter 2715 in the light of Sniadach, Fuentes, Mitchell and Di-Chem. The Court held Ohio's pre-judgment attachment statutes were unconstitutional because they required the clerk of court to issue the order of attachment upon an affidavit of the plaintiff, his agent or an attorney, without any form of judicial review. Thereafter, the Ohio legislature revised Ohio's statutes for pre-judgment attachment and recovery of specific personal property to provide for notice and judicial hearing before the attachment was issued or before an

order of possession was entered. Ohio Revs. Code §§ 2715.04; 2715.041; 2715.043; 2737.04; 2737.05; 2737.07. (Page Supp. 1983).

The Ohio legislature then addressed an issue discussed but not decided by this Court in Sniadach vs. Family Finance Corp., 395 U.S. 337, 339 (1969) and Fuentes vs. Shevin, 407 U.S. 67, 90-91 (1972), and defined the circumstances under which an order of attachment or recovery of specific personal property may be issued without notice and hearing. In identical language in Ohio Revs. Code §§ 2715.045 (Page Supp 1983) and 2737.19 (Page Supp 1983), the legislature in substance provided that such order could only be issued upon a showing that the moving party "will suffer irreparable injury if the order is delayed until the

defendant against whom the motion has been filed has been given the opportunity for a hearing." Irreparable injury is defined in subsection B of each statute as either:

> (1) There is present danger that the property will be immediately disposed of, concealed, or placed beyond the jurisdiction of the court;
>
> (2) The value of the property will be impaired substantially if the issuance of an order (of attachment) (of possession) is delayed.

These statutes are a legislative re-enactment of paragraph 2 of the syllabus of Cleveland Railway Co. vs. Jewett, 37 Ohio St. 649 (1882), where the Ohio Supreme Court stated criteria for appointment of a receiver under the predecessor of Ohio's general receivership statute, Ohio Revs. Code Ch. 2735.

Paragraph 2 of the syllabus[4/]

holds:

> The appointment of a receiver to take from the defendant the possession of his property, cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.

In the opinion, the Court stated criteria for "irreparable loss" as follows:

> There was no obstacle to giving notice to the company before acting on the appointment of a receiver. No fraud or insolvency was charged against any of the parties; nor that the property of the company was in danger of removal beyond the jurisdiction of the court, or of otherwise being lost. 37 Ohio St. 649, 659.

[4/]Under Ohio law, the syllabus of the case states the holding of the Court. Baltimore & Ohio Railroad Company vs. Baillie, 112 Ohio St. 567, 148 N.E. 233 (1925); Ohio Revs. Code § 2503.20. See also Perkins vs. Benquet Consolidated Mining Co., 342 U.S. 437, rehearing denied, 343 U.S. 917 (1952).

In the instant case, neither the District Court nor the Court of Appeals made the requisite finding under Ohio law that the Bank would suffer irreparable injury if there was a brief delay to give adequate notice and a meaningful hearing to Mr. Hacker.

5. The Courts Below Erred In Failing To Follow Ohio Statutory And Case Law.

In a diversity action, the District Court is bound by the substantive law of the state in which it sits. Erie Railroad vs. Thompkins, 304 U.S. 64 (1938). Federal Rule of Civil Procedure 64 in substance provides that remedies for pre-judgment seizure of property are available under the circumstances and in the manner provided by the law of the state in

which the District Court is held, and existing at the time the remedy is sought. Instead of identifying and applying Ohio law as required by Erie and Rule 64, the District Court said the identification of Ohio law was not "too significant". (App. 33) The Courts below erred to Petitioner's prejudice in failing to follow Ohio statutory and case law.

The instant case is an action for a money judgment only. In such a case, the Ohio courts have consistently held that the plaintiff must follow the attachment statute rather than seek appointment of a receiver. Hoiles vs. Watkins, 117 Ohio St. 165, 157 N.E. 557 (1927); Sweesy vs. Potter Oil Co., Inc. 38 Ohio App. 206, 176 N.E. 124 (Summit County 1931). The stated reason for this requirement is to prevent

plaintiffs in actions at law from avoiding the more stringent provisions of the attachment statute by seeking appointment of a receiver under Ohio's general receivership statute, Ohio Revs. Code Chapter 2735. 38 Ohio App. 206, 209, 176 N.E. 124, 125.

Even if, as the Court of Appeals appeared to find, the Bank could proceed under the general receivership statutes in Ohio Revs. Code Chapter 2735, the Bank was still bound by Ohio case law, which prohibits the appointment of a receiver without notice unless the delay required to give such notice would result in irreparable loss. Cleveland Railway Co. vs. Jewett, 37 Ohio St. 649 (1882). Thus, the "guess" of the District Court that the Bank might be injured if the receiver was not appointed (App. 29)

and the view of the Court of Appeals that the District Court's statements constituted a finding that the Bank would suffer irreparable injury if the receiver were not appointed, (App. 7-8) missed the point of Ohio statutory and case law: a receiver may only be appointed without adequate notice and without a meaningful hearing where there is proof of irreparable injury during the short time required to give the defendant a hearing. By disregarding this criterion, the District Court and the Court of Appeals explicitly substituted the general equity power of federal courts for statutes of the Ohio legislature and the case law of Ohio, which set a more favorable balance for debtors than those Courts were inclined to adopt (App. 5-6, 33).

CONCLUSION

This case raises the unusual question whether a debtor has a Fifth Amendment due process right to adequate notice and a meaningful hearing before pre-judgment seizure of personalty in a diversity case. In addition, this case raises a substantial question whether a federal district court, sitting in a diversity case, may disregard the statutory and case law of the state in which it sits, where that law effectuates decisions of this Court which recognize a due process right to adequate notice and a meaningful hearing before a provisional seizure of personalty. The discretion of federal district judges in diversity cases should not be interpreted so broadly as to override the United States

Constitution or the substantive law of the states in which they sit. It is therefore respectfully requested that this Petition be granted.

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